Supreme Court, U.S.
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No. 96-

In The

Supreme Court of the United States

October Term, 1996

Sidney J. Brown, *et al.*,

Petitioners,

v.

Resolution Trust Corporation,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the District of Columbia

PETITION FOR WRIT OF CERTIORARI

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June 2, 1997

82 pp

QUESTIONS PRESENTED FOR REVIEW

Whether a citizen has standing to seek judicial relief against the Resolution Trust Corporation where the Resolution Trust Corporation wrongfully excluded that person from bidding on notes secured by property he owned?

Whether a citizen's constitutional rights of due process are violated where that person is left entirely without a remedy for injuries caused by the Resolution Trust Corporation?

Whether the U.S. Court of Appeals for the District of Columbia's decision, which strips a private citizen of all remedies for the Resolution Trust Corporation's wrongful conduct, is inconsistent with U.S. v. Winstar Corp., 116 S.Ct. 2432 (1996) and South Carolina v. Regan, 104 S.Ct. 1107 (1984)?

PARTIES TO THE PROCEEDING SOUGHT TO BE REVIEWED

This petition seeks review of an unpublished per curiam decision of the United States Court of Appeals for the District of Columbia. The parties to that proceeding were:

Plaintiffs-Appellants:

Sidney J. Brown; Saul H. Bernstein; Sidney J. Brown and Saul H. Bernstein, as the General Partners of Nattchase Associates Limited Partnership on behalf of the Limited Partners Stuart G. Brown, Frederic K. Wine, Bradley S. Bernstein and MDB Investments Limited Partnership; Nattchase Associates Limited Partnership; Mid City Redevelopment Corporation.[1]

Defendants-Appellees:

Federal Deposit Insurance Corporation as successor to Resolution Trust Corporation.

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[1] Mid City Redevelopment Corporation is a stand-alone company and has no parent companies or subsidiaries.

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OPINION BELOW

Review is sought of an unpublished per curiam decision by the U.S. Court of Appeals for the District of Columbia, Brown et al v. Resolution Trust Corporation, Docket No. 96-5075 (D.C. Cir. January 2, 1997). The full text of the decision is set out in Appendix 1.

STATEMENT OF JURISDICTION

A panel for the U.S. Court of Appeals for the District of Columbia filed the decision which is the subject of this petition on January 2, 1997. The case was argued before a three judge panel consisting of Judges Silberman, Henderson and Buckley.

The same court denied a petition for rehearing and suggestion for rehearing en banc March 4, 1997. (Appendix 2).

This petition is filed within 90 days of the U.S. Court of Appeals for the District of Columbia's denial of rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The principal statutes involved in this case are the Financial Institution Report, Recovery and Enforcement Act of 1989 ("FIRREA") 12 U.S.C. § 1441a, the relevant portions of which are set out in Appendix 5, and 12 U.S.C. § 1821, the relevant portions of which are set out in Appendix 6.

STATEMENT OF THE CASE

I. The Nature of the Case

A. Introduction

The U.S. District Court for the District of Columbia granted the Resolution Trust Corporation's ("RTC") Motion to Dismiss the Complaint of Sidney J. Brown and Saul H. Bernstein, individually and as partners of Nattchase Associates Limited Partnership ("Nattchase") and Mid City Redevelopment Corporation (hereinafter collectively "Brown"). Despite its assumption that the RTC in fact committed wrongful acts against Brown, the Court of Appeals for the District of Columbia affirmed the district court's dismissal.

Brown's Complaint arose from actions of the RTC that intentionally denied Brown the right to bid on a note secured by property which he already owned and in which he had invested over $30 million. As a direct result of the RTC's actions, Brown lost his property and his $30 million investment. Brown's Complaint includes claims for monetary and declaratory relief.

As discussed below, Brown's claims reached the D.C. Circuit as a result of the Court of Appeals for the Fourth Circuit's ruling that, after Brown exhausted the RTC's administrative remedies, he would be entitled to de novo judicial review of his claims. Accordingly, after exhausting the RTC's administrative remedies, Brown initiated the district court action. In plain disregard of the Fourth Circuit's decision, however, the district court refused to give Brown the de novo review provided by statute and promised by the Fourth Circuit and summarily dismissed

Brown's Complaint. In dismissing Brown's Complaint, and in affirming that dismissal, the district court and the D.C. Circuit have adopted the RTC's position that it is immune from any liability under any circumstances.

The D.C. Circuit's decision undermines over 20 years of federal court precedent recognizing the standing of a disappointed bidder to recover damages from a federal agency. If the RTC is allowed to violate the law in excluding Brown from bidding on notes secured by property he owned, and he does not have standing to challenge the RTC's conduct, then no disappointed bidder has standing.

B. Facts

On June 20, 1988, Plaintiff Nattchase purchased from Sajacito, Inc. ("Sajacito") properties in Loudoun County, Virginia known as "Nattak" (72 acres) and "Steeplechase" (250 acres) (collectively, the "Properties") for a price of $45,000,000. Nattchase paid $9,000,000 in cash at settlement, plus closing costs, and financed the balance of the purchase price by a $36,000,000 deferred purchase money note and deed of trust provided by Sajacito, which was wholly owned by San Jacinto Savings Association ("San Jacinto"), a federal savings and loan, which in turn was owned by Southmark Corporation ("Southmark"). None of these entities ever advanced any monies to Brown. Since purchasing the Properties, Nattchase has paid a total of $15,000,000 in principal and interest, $1,500,000 in real estate taxes, at least $6,000,000 to develop the Properties, and has incurred other costs for a total out-of-pocket investment of over $32,000,000. As recently as six months prior to the RTC's May 5, 1993 sale of the note to CMF

Loudoun, L.P. ("CMF"), Brown paid the RTC approximately $500,000 on account of interest due.

The RTC assumed control over and became responsible for San Jacinto as a failed institution and succeeded to the interest of San Jacinto, including an assignment of Nattchase's deed of trust and note held by Sajacito. After commencing to make payments, Nattchase failed to make certain principal and interest payments on its note as a result of the depression in the commercial real estate market, and also as a result of actions by Southmark, Sajacito and/or San Jacinto that prevented the intended development of the Property. Based upon representations and omissions of material facts by San Jacinto, Sajacito and/or Southmark, Nattchase purchased the Properties with the expectation and intent that the Nattak site could be developed as a regional shopping center. Upon information and belief, Southmark, Sajacito and/or San Jacinto conspired with others in a scheme to prevent Nattchase from developing Nattak as a regional shopping center in favor of another Southmark property near the Nattak site.

The RTC "packaged" the Nattchase note for sale in a "pool" with two other notes that were unrelated to the Properties owned by Nattchase and as to which Nattchase had no legal or financial relationship. The bidding package offered by the RTC barred Nattchase and its principals or affiliates from bidding on any of the notes in the pool on the ground that Nattchase was the principal on the note secured by the Properties.

The RTC proceeded to sell the "package" of notes to CMF for a price of $14,000,000, of which approximately $5,000,000 is allocable to the Properties. In other words, the RTC received about 10% of the amount due on the

Nattchase note. CMF refused to negotiate a settlement with Brown and immediately moved to foreclose on the Properties. The RTC's exclusion of Brown from the bidding process, in addition to the actions of Southmark, Sajacito and/or San Jacinto that prevented the intended development of the Properties, effectively took from Brown his substantial investment in the Properties. The RTC sold the note for a fraction of the amount which would have been offered by Brown if allowed to bid at a time when the RTC knew or should have known that CMF or any other purchaser planned to foreclose on the Properties.

From January 1990 until the present action was filed, Brown has made numerous proposals to settle or resolve, in whole or in part, Nattchase's obligations under the note securing the Properties. Face-to-face negotiations were conducted and correspondence exchanged between Brown and San Jacinto and the RTC. By letter dated August 18, 1993, Brown formally objected to the RTC's illegal and unconstitutional actions in refusing to allow Brown to bid on the Properties and requested that the RTC set aside the sale and readvertise for bids. Brown also advised the RTC that the financial consequences of its actions were a loss of investment costs and opportunities of over $30,000,000. The RTC responded by letter dated September 8, 1993, stating that "[a]ny further issues" must be raised with the purchasers of the note, i.e., CMF, and that the RTC "no longer maintains any right, title, or interest in the loan."

The deferred purchase money note and deed of trust provided to Nattchase by Southmark, San Jacinto and/or Sajacito with respect to the Properties at issue was and is the only financial transaction between Nattchase and its individual principals and Southmark, San Jacinto and/or Sajacito. Brown intended to submit a bid for the notes at

issue, but had not determined the source of financing as of the time that the RTC barred Brown from bidding. Therefore, Brown did not propose to purchase the assets in the pool in whole or in part through the use of the proceeds of a loan or advance of credit from the RTC or from any institution subject to the jurisdiction of the RTC under its enabling legislation.

II. Course of the Proceedings Below

1. District Court - Eastern District of Virginia

On November 19, 1993, Brown filed a Complaint in the U.S. District Court for the Eastern District of Virginia seeking injunctive relief, declaratory judgments and monetary and punitive damages, and also filed a motion for a temporary restraining order and preliminary injunction.[2]

On November 19, 1993, the same day that the Complaint was filed, the parties appeared before the district court for a hearing on Brown's application for a TRO. In its order of November 19, 1993, the District Court denied Brown's application for a TRO and preliminary injunction and, although the district court recognized the continued viability of certain of Brown's causes of action, it dismissed Brown's Complaint with prejudice.

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[2] Specifically, Brown sought an injunction which would: 1) enjoin the foreclosure sale of the Properties scheduled for November 22, 1993; 2) set aside the sale of the note to CMF; and 3) require the RTC to resolicit bids on the note and allow Brown to participate upon the same terms as the other bidders.

2. U.S. Court of Appeals for the Fourth Circuit

On December 17, 1993, Brown filed with the U.S. Court of Appeals for the Fourth Circuit a timely notice of appeal from the district court's order of November 19, 1993. On July 25, 1994, the Fourth Circuit issued its unpublished per curiam Opinion on the appeal. (Appendix 3).

The Fourth Circuit first addressed Brown's claims for monetary and declaratory relief against the RTC.[3] Citing 12 U.S.C. §§1821(d)(13)(D) and (d)(6)(A), the Fourth Circuit determined that claimants such as Brown were required to submit their claims against the RTC, including claims for declaratory judgment, to the administrative claims process before seeking judicial review. The Fourth Circuit stated:

> This exhaustion requirement applies to claims arising both before and after RTC's appointment as receiver, [citation omitted], and to declaratory judgment actions. See Henderson v. Bank of New England, 986 F.2d 319, 321 (9th Cir.) (§ 1821(d)(13)(D) "bars judicial review of any non exhausted claim, monetary or nonmonetary, which is 'susceptible of resolution through the claims procedure'"), [citation omitted].

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[3] The Fourth Circuit described Brown's Complaint as including the following claims: 1) declaratory judgment against the RTC; 2) rescission of the contract of sale for the note; 3) judgment requiring another bidding process; 4) injunctive relief against CMF's scheduled foreclosure; and 5) monetary damage claim against the RTC.

(emphasis supplied).

The Fourth Circuit found that Brown had failed to exhaust his administrative remedies, without addressing the merits of Brown's monetary and declaratory claims. The Fourth Circuit held that the exclusion of Brown from bidding on the notes may have been an "erroneous determination by the RTC as to permissible bidding participants," but that "Brown must first pursue his claims under FIRREA's administrative scheme."

The Fourth Circuit acknowledged that the district court had erred in its dismissal with prejudice of Brown's claims for declaratory and monetary relief and therefore ruled:

> [W]e find that the district court properly dismissed Brown's claims against RTC, pending presentation of his claims to RTC under the statutory administrative procedures. However, consistent with the RTC's concession, we modify that disposition to reflect a dismissal without prejudice of Brown's claims against RTC, so that Brown may indeed pursue his claims according to the statutory scheme.

(emphasis supplied).

The final paragraph of the Fourth Circuit's decision summarizing its disposition of Brown's appeal reads in its entirety:

> For the reasons stated herein, we affirm the district court's dismissal with prejudice of Brown's claim against CMF, and its denial

> of injunctive relief. We modify the dismissal of Brown's claims against the RTC to reflect a dismissal without prejudice, and affirm that disposition. Finally, we affirm the district court's denial of Brown's Rule 60(b) motion.

(emphasis supplied). In sum, the Fourth Circuit could not have been more clear that the only claims dismissed with prejudice were Brown's claims against CMF and Brown's claims for injunctive relief. Brown's claims against the RTC for both monetary and declaratory relief were dismissed without prejudice, giving rise to Brown's statutory right to de novo review by the U.S. District Court for the District of Columbia after exhaustion of the RTC's administrative procedures.

On August 5, 1994, Brown filed with the Fourth Circuit a petition for rehearing and a suggestion for rehearing en banc. Both the petition and suggestion were denied without opinion on August 19, 1994.

3. U.S. Supreme Court

On November 15, 1994, Brown filed a petition for a writ of certiorari with the Supreme Court. Brown's petition was denied without opinion on February 21, 1995.

4. The RTC's Administrative Procedures

On or about November 29, 1993, during the pendency of Brown's action in the United States District Court for the Eastern District of Virginia, the RTC mailed to Brown "Proof of Claim" forms with regard to Brown's claims against the RTC. Brown timely filed the forms as

requested by the RTC, while explicitly preserving his rights and remedies. By letter dated January 10, 1995, and received by Brown on January 17, 1995, the RTC disallowed Brown's claims and advised Brown that an action may be brought "on or prior to March 13, 1995 ... in the ... United States District Court for the District of Columbia."

5. District Court - District of Columbia

Brown then filed suit in the U. S. District Court for the District of Columbia on February 17, 1995, seeking de novo review of Brown's claims for declaratory and monetary relief which had been disallowed by the RTC. Brown's action contained three counts. In Count I, Brown asked the court to issue a judgment declaring that the RTC's sale of the notes to CMF was illegal, null and void. In Count II, Brown sought money damages based upon the RTC's violation of Brown's constitutional rights.[4] In Count III, Brown sought money damages based upon the RTC's illegal and otherwise wrongful exclusion of Brown from bidding on the notes. Jurisdiction over Brown's action was expressly predicated on 12 U.S.C. §1821(d)(6).

On May 17, 1995, the RTC filed a motion to dismiss Brown's action. On February 14, 1996, the district court entered an order granting the RTC's motion and dismissed Brown's action with prejudice. With regard to Count I, the court held that, based upon the Fourth Circuit's decision concerning Brown's previous request to have the sales agreement with CMF rescinded, the doctrine of res judicata barred Brown's request for a declaratory judgment.

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[4] Brown does not challenge in this petition the district court's ruling with regard to Count II of his Complaint.

With regard to Count III, the court made alternative rulings. First, the court held that, whereas 12 U.S.C. §1441a(a)(f)(1) specified certain persons that may not bid on properties held by the RTC, Congress otherwise granted the RTC complete discretion to exclude from bidding any other persons. In the alternative, the court held that, even assuming arguendo that Brown's exclusion from bidding was illegal, Brown lacked standing to seek judicial relief.

6. U.S. Court of Appeals for the District of Columbia

Brown timely appealed the district court's dismissal of his Complaint to the Court of Appeals for the District of Columbia. The D.C. Circuit assumed, without deciding, that Brown could prevail against the RTC on a claim of wrongful exclusion from bidding. Nonetheless, the D.C. Circuit concluded that Brown lacked standing because he could not obtain any redress for any of the injuries caused by the RTC's actions. With regard to Brown's claims for declaratory relief, the D.C. Circuit held that the Fourth Circuit's dismissal of Brown's claims for injunctive relief was res judicata as to the declaratory relief sought. With regard to Brown's monetary claims, the D.C. Circuit held that these claims were too speculative.[5]

In sum, the D.C. Circuit left Brown entirely without a remedy despite its assumption that the RTC had wrongfully excluded Brown from bidding.

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[5] Additionally, as will be discussed in more detail below, the D.C. Circuit simply overlooked certain of Brown's monetary claims.

REASONS FOR ALLOWING THE WRIT

I. Introduction

The tortuous path of Brown's claims against the RTC has reached an impasse that is as improbable as it is unfair. The Fourth Circuit ruled that Brown must exhaust his administrative remedies before seeking de novo review in the appropriate federal court. The Fourth Circuit thus dismissed Brown's claims without prejudice.

Brown did exactly as the Fourth Circuit directed. Predictably, of course, the RTC denied Brown's administrative claims against the RTC. Despite Brown's statutory right to de novo review of the merits of his claims, the district court ruled that Brown's claims for declaratory relief were barred by the doctrine of res judicata and that Brown does not even have standing to seek money damages for the RTC's wrongful conduct. The D.C. Circuit affirmed this ruling. Brown, in other words, has no remedy despite the ruling of the Fourth Circuit and the statutory guarantee of de novo review. See 12 U.S.C. § 1821(d)(6).

The reasons for allowing the Writ are threefold. First, Brown has standing to seek judicial relief for the RTC's wrongful conduct. Not only is the D.C. Circuit's decision in direct contravention of the Fourth Circuit's previous ruling in this matter, but it ignores the statutory scheme enacted by Congress, the rules for standing pronounced by this Court, and this Court's recent decision in U.S. v. Winstar Corp., 116 S.Ct. 2432 (1996). Second, the D.C. Circuit's decision leaves Brown entirely without a remedy for injuries the court assumed were caused by the RTC's wrongful conduct. As such, the D.C. Circuit's decision

results in a deprivation of Brown's due process rights. The D.C. Circuit's decision in this respect is in conflict with its own previous decisions, the previous decisions of this Court, and previous decisions of other circuit courts of appeal.

Third, the D.C. Circuit's decision has more far reaching and dangerous ramifications than simply the unjust consequences for Brown. The D.C. Circuit has effectively held that a federal agency can violate federal law, inflict damage upon a private citizen, and yet be completely immune from suit. Nothing in the D.C. Circuit's decision would restrict its application to Brown or to the RTC (FDIC). Without any rational basis or support, the D.C. Circuit has created and conferred upon all federal agencies a license to injure any private citizen without fear of recourse.

For these reasons, Brown respectfully requests that this Court allow this writ.

II. Brown Has Standing To Seek Judicial Relief For The RTC's Wrongful Exclusion Of Brown

FIRREA contains express provisions which allow persons in Brown's situation to bring a claim against the RTC in federal district court and to receive de novo judicial review of that claim. 12 U.S.C. §1821(d)(6)(A). Several circuit courts of appeal, including the D.C. Circuit, have previously held that this provision affords a claimant de novo judicial review of his claims against the RTC. See e.g., Freeman v. F.D.I.C., 56 F.3d 1394, 1395 (D.C.Cir. 1995); Bueford v. R.T.C., 991 F.2d 481, 486 (8th Cir. 1993); Telematics International, Inc. v. NEMLC Leasing Corp., 967 F.2d 703, 705 (1st Cir. 1992); Rosa v. R.T.C.,

938 F.2d 383, 396 (3d Cir. 1991).[6] Thus, based on the statutory scheme enacted by Congress, Brown has standing to pursue his claims against the RTC.

In the alternative, Brown argued in both the district court and the D.C. Circuit that an implied private right of action existed under FIRREA for the RTC's illegal conduct. Under 12 U.S.C. §1441a(a)(14)(B)(viii), the RTC is required to promulgate, as part of its strategic plan for conducting its functions and activities, "[s]tandards for adequate competition and fair and consistent treatment of offerors." Moreover, pursuant to 12 U.S.C. §1821(d)(13)(E)(iii), the RTC is dutybound to "conduct its operations in a manner which ... ensures adequate competition and fair and consistent treatment of offerors." These provisions, among others, confer upon Brown a private right of action against the RTC for its wrongful

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[6] It is noteworthy that, in the Fourth Circuit, the RTC championed FIRREA's de novo review provisions. In its Brief before the Fourth Circuit, the RTC stated:

> In regard to the district court's dismissal with prejudice, the RTC notes that 12 U.S.C. §1812(d)(7)(A) (sic) establishes a claimant's right to de novo judicial review of the receiver's final determination. Thus, in order to insure Brown's statutory right to de novo review, after he completes FIRREA's claims process...the dismissal of any allowable claims for monetary or non-monetary relief against the RTC should be without prejudice.
>
> * * * *
>
> Brown has filed a claim with the RTC, which the RTC is considering. If the RTC fails to grant the claim, FIRREA will allow Brown to file suit against the RTC.... [6]

exclusion of Brown from bidding on RTC-owned property. See Cort v. Ash, 95 S.Ct. 2080 (1975).

In its decision affirming the district court's dismissal, the D.C. Circuit simply opted not to address either 12 U.S.C. § 1821(d)(6)(A) or Brown's implied private right of action argument. Instead, the D.C. Circuit ruled that Brown could not obtain redress for any injury caused by the RTC's actions.[7] (Appendix 1). Remarkably, in so ruling, the D.C. Circuit assumed that Brown could prevail against the RTC on his claim of wrongful exclusion from bidding.

The D.C. Circuit addressed Brown's declaratory and monetary claims separately. With regard to Brown's claim for declaratory relief, the D.C. Circuit held that Brown could not obtain redress because the Fourth Circuit's decision pertaining to Brown's claims for injunctive relief in that court were res judicata as to Brown's claims for declaratory relief. With regard to Brown's claim for monetary relief, the D.C. Circuit held that Brown could not obtain redress because his claim was too speculative. For the reasons that follow, Brown respectfully submits that the D.C. Circuit erred in both respects, and that Brown does have standing based either on the express right of action under 12 U.S.C. § 1821(d)(6)(A) or on the implied private right of action under the Cort analysis.

The D.C. Circuit was plainly wrong in ruling that the Fourth Circuit's holding with respect to Brown's claims for injunctive relief in that court were res judicata as to Brown's claims for declaratory relief.

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[7] According to the D.C. Circuit, redressability was one of three elements required to confer standing. Brown agrees, but his claims were clearly redressable for the reasons stated in this petition.

Brown's complaint in the U.S. District Court for the Eastern District of Virginia sought declaratory judgments regarding the unconstitutionality of the RTC's actions, its bidding procedures and its regulations, Brown's legal and Constitutional rights, and Brown's contractual rights and obligations. The district court dismissed each of these claims with prejudice. As stated above, however, the Fourth Circuit "modif[ied] [the district court's] disposition to reflect a dismissal without prejudice of Brown's claims against the RTC, so that Brown may indeed pursue his claims according to the statutory scheme." (Appendix 3) (emphasis supplied). The Fourth Circuit's modification of the district court's disposition to reflect a dismissal without prejudice plainly encompassed both Brown's monetary claims against the RTC as well as his claims for declaratory judgment against the RTC.

In strict accordance with the Fourth Circuit's Opinion, Brown exhausted the RTC's administrative procedures. After the RTC formally disallowed his claims, Brown filed his Complaint in the district court below. In Count I, Brown claimed that the RTC's sale of the notes to CMF was illegal, null and void, and asked the court to issue a declaratory judgment with regard to the parties' legal rights and obligations. However, despite Brown's adherence to the Fourth Circuit's instructions, the district court ruled that his claim for declaratory judgment was barred by the doctrine of res judicata based upon the Fourth Circuit's decision. (Appendix 4). The D.C. Circuit blindly followed the district court's lead.

"[R]es judicata prevents the relitigation of any claim that was or might have been brought in a prior action resolved on its merits...." Novak v. World Bank, 703 F.2d 1305, 1309 (D.C.Cir. 1983) (Emphasis supplied). The glaring

error in the D.C. Circuit's decision is that the Fourth Circuit did not resolve Brown's claims for declaratory judgment on their merits. To the contrary, the Fourth Circuit modified the dismissal of Brown's claims for declaratory judgment with prejudice to reflect a dismissal without prejudice. The dismissal of a claim without prejudice cannot serve as the basis for a res judicata defense. The Fourth Circuit's dismissal of Brown's declaratory judgment claims without prejudice is the law of the case. Res judicata simply is not applicable to Count I of Brown's Complaint.

The D.C. Circuit was also plainly wrong in ruling that Brown's claims for monetary relief were too speculative. Brown's damage claim, which the D.C. Circuit characterized as one for "lost profits," could have been proven through the use of a number of different methodologies.[8] First, Brown would have offered proof of the profits he would have realized had he been allowed to continue developing the Properties, through appraisals, comparable sales and/or outstanding offers. Alternatively, Brown would have offered proof of the difference between the fair market value of the Properties and the price he would have paid for the deferred purchase money note had he been permitted to bid. These methodologies present acceptable means of proving Brown's damages, none of which are too speculative even to confer standing.

Brown's claims for money damages may be more difficult to prove with reasonable certainty than other more typical claims for money damages. It may also be that, for

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[8] Courts have awarded lost profits under appropriate circumstances. See e.g., Flota Mercante Grancolombiana v. Federal Maritime Commission, 373 F.2d 674, 677 (D.C.Cir. 1967); Sears, Roebuck and Company v. Goudie, 290 A.2d 826, 833-34 (D.C.App. 1972).

this reason, the "better" remedy for the RTC's wrongs would have been to rescind the sale of the notes, resolicit bids, and allow Brown to bid. According to the Fourth Circuit and the D.C. Circuit, however, Congress saw fit to preclude the "better" remedy. Nevertheless, Brown should not be punished for Congress's decision. Brown should be given every chance to prove his damages claim.

The D.C. Circuit's decision is also inconsistent with the logic and public policy rationale of this Court's decision in U.S. v. Winstar Corp. et al. 116 S.Ct. 2432 (1996). The Government argued in Winstar that FIRREA endowed the Government with defenses of sovereign immunity and the unmistakeability principle. The Court held, however, that:

> [T]he contracts have not been construed as binding the Government's exercise of authority to modify banking regulation or of any other sovereign power, and there has been no demonstration that awarding damages for breach would be tantamount to any such limitation.

Id. at 2458. In other words, parties aggrieved by the conduct of the RTC should not be denied every avenue of relief, but instead should be afforded the opportunity to pursue a claim for money damages against the RTC. Indeed, this Court further stated, "damages are always the default remedy for breach of contract." 116 S.Ct. at 2460. The Court cited with approval comment a to § 346 of the Restatement (Second) of Contracts ("Every breach of contract gives the injured party a right to damages against the party in breach.")

In addition to what the D.C. Circuit characterized as a claim for lost profits, Brown also sought recovery of his bid preparation costs in accordance with the legal principles established in Keco Industries v. United States, 203 Ct. Cl. 566, 592 F.2d 1200 (1974) and in Heyer Products v. United States, 135 Ct. Cl. 63, 140 F.Supp. 409 (1956). These cases establish that the Government impliedly contracts with prospective contractors to fairly consider their proposals, the breach of which gives rise to a claim for damages. Winstar establishes that FIRREA does not insulate the RTC from breach claims. The D.C. Circuit's decision, however, denies that Brown even has standing to assert such claims.[9]

In a case strikingly similar to the case at bar, a U.S. District Court applied the Cort test and concluded that a person in Brown's position did in fact have a private right of action against the RTC under 12 U.S.C. §1441a(a)(14)(B). Crowe v. Smith, 852 F.Supp. 533 (W.D.La. 1994).

In Crowe, Crowe sought to purchase real property owned by the RTC, but the RTC rejected Crowe's offer purportedly because the offer did not meet the RTC's

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[9] Based on an apparent misconception regarding the damages sought in Brown's Complaint, the D.C. Circuit concluded that bid preparation costs were not even alleged. This conclusion is not correct. During oral argument, Brown's counsel explained that Brown "certainly had out of pocket expenses in attempting to prepare a package to submit for bid ... That's included in the damages alleged in the complaint" (Tr. 9). The court acknowledged that such damages were pled by Brown: "Perhaps you've got enough here, although I doubt it, to hold onto this bidding preparation expenses,..." (Tr. 13). In short, Brown's bid preparation costs and the government's breach of its implied contract to fairly consider Brown's bid were certainly at issue.

bidding conditions.[10] Crowe filed suit against, among others, the RTC, alleging that the RTC violated 12 U.S.C. §1441a(a)(14)(B). The RTC filed a motion to dismiss and argued that Crowe had no private right of action against the RTC. The Crowe court examined each prong of the Cort test and concluded that the RTC's position was without merit. With regard to the first prong, whether Crowe was among the class of persons for whose special benefit the statute was enacted, the court answered in the affirmative. The court stated that Congress enacted FIRREA in the interest of the taxpayers and, therefore, all tax-paying Americans satisfied this first prong. Moreover, as §1441a(a)(14)(B)(viii) specifically required the promulgation of "standards for adequate competition and fair and consistent treatment of offerors," the court held that FIRREA was enacted for the special benefit of Crowe, an offeror.[11]

The Crowe court described the second prong - whether there was any legislative intent to create a private remedy - as the most important inquiry. The court concluded that there was such an intent: "Because Congress in FIRREA mandated the establishment of procedures and standards to protect offerors, the statute itself indicates legislative intent

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[10] Plaintiff Crowe appears to have been in a similar position to that of Brown. Crowe was a member of a partnership that purchased and sought to develop real property as residential housing, but was prevented from doing so by the failed institution to whose interests the RTC later succeeded. Crow was "financially exhausted," and foreclosure proceedings were instituted. Crowe sought to "repurchase the property" with new investors, but the RTC denied Crowe the right to bid on the properties. 852 F. Supp. at 536.

[11] The Crowe court did not even consider the RTC's obligations under 12 U.S.C. § 1821(d)(13)(E)(iii).

to create a remedy for breaches of these standards and procedures." 852 F.Supp. at 540. In reaching this conclusion, the Crowe court relied upon the D.C. Circuit's decision in Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C.Cir. 1970). In Scanwell, the D.C. Circuit concluded that disappointed bidders for federal contracts had standing in federal court to sue the federal government. The Crowe court quoted the following passage from Scanwell:

> [w]hen Congress has laid down guidelines to be followed in carrying out its mandate in a specific area, there should be some procedure whereby those who are injured by the arbitrary or capricious action of a governmental agency or official in ignoring those procedures can vindicate their very real interests....

Crowe, 852 F.Supp. at 539, quoting, Scanwell, 424 F.2d at 864.[12]

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[12] The D.C. Circuit in Scanwell further stated:

> Regardless of the merits of plaintiff's case, it should be granted the right, if possible, to make a prima facie showing that the government's agents did in fact ignore the Congressional guidelines in the manner in which they handled the granting of contracts. If there is arbitrary or capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity? It seems to us that it will be a very healthy check on governmental action to allow such suits....

424 F.2d at 866-67.

The Crowe court quickly dispensed with the third and fourth prongs of the Cort test. With regard to the third prong - whether it was consistent with the underlying purposes of the legislative scheme to imply a private right of action - the court concluded that it was "entirely consistent with the purposes of FIRREA ... to grant a private right of action 'whereby those who are injured by the arbitrary or capricious action of a governmental agency or official in ignoring those procedures can vindicate their very real interests....'" 852 F.Supp. at 540, quoting, Scanwell, 424 F.2d at 864. The fourth prong - whether the cause of action was one traditionally relegated to state law - "was indisputably answered in the plaintiffs' favor." 852 F.Supp. at 540. Whether a federal agency disposes of federal property properly is an issue solely of federal concern. Id.

The reasoning applied by the district court in Crowe is equally applicable to the case at bar. As did Crowe, Brown challenges the RTC's "standards for adequate competition and fair and consistent treatment of offerors." See 12 U.S.C. §1441a(a)(14)(B). Brown also challenges the RTC's breach of its duty to "ensure[] adequate competition and fair and consistent treatment of offerors." See 12 U.S.C. §1821(d)(13)(E). Moreover, Brown challenges the RTC's power to exclude him as an offeror. See 12 U.S.C. §1441a(f). Brown satisfies all four prongs of the Cort test and therefore has a private right of action against the RTC for its violations of FIRREA.

III. The Decision Of The Court Of Appeals For The District Of Columbia That Brown Lacks Standing Constitutes A Violation Of Brown's Due Process Rights

The fundamental constitutional question presented by this petition for writ is whether a private citizen aggrieved by the wrongful conduct of a government agency should be left entirely without a remedy. After the RTC wrongfully excluded him from bidding, Brown theoretically had at least two different remedies. Brown could have sought injunctive relief, i.e., rescission of the sale of the notes and a rebid which included Brown. Brown also could have sought money damages. Brown sought both. Brown's claims for injunctive relief were rejected by the Fourth Circuit on the basis of 12 U.S.C. § 1821(j). (Appendix 3). However, the Fourth Circuit expressly recognized Brown's right to pursue his money damages against the RTC.

Although Brown disagreed with the Fourth Circuit's disposition of his claims for injunctive relief, he at least was not left without a remedy. However, before the D.C. Circuit, Brown's right to pursue his only remaining remedies - declaratory judgment and money damages - was eliminated. The D.C. Circuit did not reach the merits of Brown's claims; instead, it simply held that Brown had no standing to sue the RTC for what the court assumed was wrongful conduct.

The D.C. Circuit's disposition of Brown's claims is not only incorrect and unfair, but directly contradicts at least two of its own prior decisions. See Freeman v. F.D.I.C., 56 F.3d 1394 (D.C.Cir. 1995); National Trust For Historic Preservation v. F.D.I.C., 21 F.3d 469 (D.C.Cir. 1994). In both cases, the D.C. Circuit wrestled with the draconian

nature of the FIRREA's anti-injunction provision, 12 U.S.C. §1821(j). The D.C. Circuit applied §1821(j) as a bar in both cases, but was very careful to emphasize that the elimination of injunctive relief as a remedy did not leave the plaintiff entirely without a remedy. In National Trust, Judge Wald opined in her concurring opinion:

> Therefore, I am compelled to conclude that §1821(j) does indeed bar courts from "restrain[ing] or affect[ing] the exercise of powers or functions of the [FDIC] as conservator or a receiver...." I am somewhat assuaged by the fact, described at oral argument and in the briefs, that a private person genuinely aggrieved by such unlawful FDIC action could generally bring a suit for damages, or seek administrative redress through the §1821(d) monetary claims procedure which ultimately includes judicial review.

National Trust, 21 F.3d at 472. Relying on Judge Wald's concurring opinion in National Trust, the D.C. Circuit went one step further in Freeman. After enforcing the bar of §1821(j), the court ruled:

> [A]s we noted in National Trust, serious due process concerns would be implicated if parties aggrieved by FDIC's actions as receiver were left entirely without remedies. In many cases, however, aggrieved parties will have opportunities to seek money damages or other relief through the administrative claims process provided in 12 U.S.C. §1821(d), and their claims are

> ultimately subject to judicial review. (Emphasis supplied).

Freeman, 56 F.3d at 1399.

The above passage from Freeman hits the nail squarely on the head. The D.C. Circuit first held that Brown could not obtain any form of equitable relief, be it injunctive or declaratory. Next, in direct contravention of the Fourth Circuit and its own decisions in National Trust and Freeman, the D.C. Circuit ruled that Brown had no standing to pursue his claims for money damages against the RTC. The RTC is thus completely immune from liability for its wrongful conduct, while Brown is left entirely without any remedies. If this result does not implicate due process concerns, then nothing does.[13]

Moreover, not only is the D.C. Circuit's decision in this case inconsistent with its own previous rulings, but it is also inconsistent with previous rulings of this Court and other Circuits. In South Carolina v. Regan, 104 S.Ct. 1107 (1984), this Court held that the Anti-Injunction Act relating to tax matters did not apply to this particular plaintiff because there was no alternative remedy. The Court concluded: "[T]he Anti-Injunction Act's purpose and the circumstances of its enactment indicate that Congress

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[13] The D.C. Circuit in both National Trust and Freeman recognized that, under appropriate circumstances, the denial of injunctive relief could itself constitute a violation of due process, if such denial also denied the aggrieved party of every other avenue of relief. Freeman, 56 F.3d at 1403; National Trust, 21 F.3d at 473. In the present case, assuming arguendo that the D.C. Circuit is correct and Brown has no standing to pursue his money damages, then the denial of declaratory relief may itself constitute a violation of due process as well.

did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." 104 S.Ct. At 1114. See also, U.S. v. Winstar, supra.

In the instant case, the Fourth Circuit denied Brown's claims for injunctive relief based on FIRREA's anti-injunction provision (§ 1821(j)), and instructed Brown to pursue his alternative remedies provided by Congress under § 1821(d)(6)(A). However, the D.C. Circuit held that Brown had no standing to pursue these alternative remedies. This Court's decision in Regan teaches that both the Fourth Circuit and the D.C. Circuit cannot be correct, and that Congress certainly had no intention of enacting such a patently unfair legislative scheme that would leave an aggrieved party without any remedy. Inasmuch as it is too late to reconsider the wisdom of the Fourth Circuit's ruling, Brown respectfully submits that the D.C. Circuit's decision be reversed and Brown given the opportunity to pursue his alternative remedies.

Other Circuits, while specifically addressing FIRREA, have reached similar conclusions. In Bueford v. R.T.C., 991 F.2d 481 (8th Cir. 1993), a claimant argued that the RTC's administrative procedures amounted to a deprivation of her due process rights. The court disagreed, however, because her claims were subject to de novo judicial review: "Since the language of the statute [12 U.S.C. § 1821(d)(6)(A)] provides for judicial review after exhaustion of the administrative procedures, Bueford cannot prevail on her claim that FIRREA's administrative procedures deny her due process by making judicial review unavailable." 991 F.2d at 486. See also, Telematics International, Inc. v. NEMLC Leasing Corp., 967 F.2d 703, 705 (1st Cir. 1992) ("Congress did not leave individuals having claims against

the institution without a remedy, however....A party may seek administrative review or may pursue legal remedies in the district court.")

The D.C. Circuit cannot be correct in its decision to strip Brown of his sole remaining remedy against the RTC. Otherwise, Brown would have no remedy and will have thus been deprived of his due process rights. Congress clearly never intended this result.

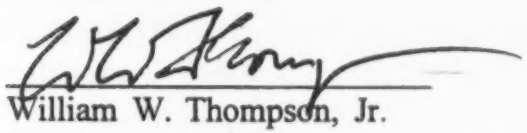
IV. Summary

The ramifications of the D.C. Circuit's decision are far greater than simply the inequitable and unconstitutional result occasioned in this case. There is no reason that the D.C. Circuit's rationale could not be applied to any aggrieved citizen or to any federal agency. According to the D.C. Circuit, regardless of the damage inflicted by a federal agency, the aggrieved citizen does not even have standing to challenge the wrongs committed. This is a dangerous new direction which is not supported by any of this Court's precedents. If Brown has no standing, then federal agencies will be free to violate bidding rules with impunity.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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